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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 363

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, ET AL., *Petitioners,*

v.

NATIONAL MEDIATION BOARD, ET AL., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, et al,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in consolidated Cases Nos. 21620, 21622 and 21623 on June 28, 1968.

[1] Petitioners include the individual employees who were plaintiffs in the actions in the District Court.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the United States District Court for the District of Columbia, entered on January 22, 1968, in Civil Actions Nos. 2853-67 and 2854-67, are unreported and are printed in Appendices B and C hereto, *infra,* pages 9a and 27a. The opinion of the Court of Appeals, entered June 28, 1968, is unreported and is printed in Appendix D hereto, *infra,* page 36a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1968, and is reproduced as Appendix E hereto, *infra,* page 52a. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

In the opinion of petitioners, this petition presents the following questions:

1. Is the jurisdiction of a Federal district court to review actions of the National Mediation Board in representation disputes before the Board under Section 2, Ninth, of the Railway Labor Act limited only to those actions involving instances of constitutional dimension or gross violations of the statute by the Board?

2. Does a Federal district court have jurisdiction to review the issue of whether the Mediation Board has complied with its statutory duty to investigate a representation dispute where the Board has refused to make findings and act upon challenges to ballots cast in a mail ballot representation election raising, *inter alia,* substantial questions of fraud, violations of

Federal Postal regulations, and the validity of ballots cast for a representative who cannot legally serve?

3. Does a Federal district court have jurisdiction to review the issue of whether the National Mediation Board has statutory authority in a representation dispute to attempt to decertify an incumbent union by requiring that its name appear on the ballot in a representation election or abandon any claim to represent the employees involved; the issue of whether the Board's regulations authorize such action; and the further issue of whether the Board can take such action other than by a rule of general applicability?

4. Does a Federal district court have jurisdiction to review the issue of whether the National Mediation Board has violated its long established regulations and its statutory duty in refusing to dismiss a representation application where, at the time of a challenge to the existence of a valid representation dispute, changes in the composition of the craft or class of employees involved by way of hiring and turnover make it a physical impossibility for there to be compliance with the Board's regulations?

STATUTES, RULES AND REGULATIONS INVOLVED

This litigation involves Title 28 of the United States Code, Sections 1331, 1332, 1337, and 2201; Section 10 of the Administrative Procedure Act, as amended (5 U.S.C.A., Section 702); Sections 2, Fourth, and 2, Ninth, of the Railway Labor Act (45 U.S.C.A., Sections 152, Fourth, and 152, Ninth); Sections 1202.3, 1202.5, 1203.2, 1206.2, 1206.3, and 1206.4 of the Rules of the National Mediation Board, Title 29, Code of Federal Regulations, Chapter X, 13 F.R. 8740; and Part 332, sub-

paragraph 4 of the Post Office Department Manual. These provisions are reproduced in Appendix A hereto, *infra*, page 1a.

STATEMENT

The Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("Clerks") was certified on May 16, 1946, by the National Mediation Board as the duly authorized representative for the purposes of the Railway Labor Act (45 U.S.C.A., Section 151, et seq.), of the clerical, office, and related employees of Pan American World Airways, Inc. The Clerks have represented such employees continuously from that date and represent them at the present time (R. 185, 186).[2] On August 6, 1965, the International Brotherhood of Teamsters filed an application with the Mediation Board, pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C.A., Section 152, Ninth), to investigate an alleged representation dispute among the employees of Pan American involved and to certify the Teamsters as the duly designated representative of such employees. This application was docketed by the Mediation Board as Case No. R-3781.

A mail ballot election was conducted by the Board between August 8, 1966, and September 7, 1966, on the Teamsters application. The Clerks, without objection from the Board or the Teamsters, elected to omit its name from the ballot in this election so that it would be necessary for there to be cast for the Teamsters,

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[2] Reference is to pages of certified joint appendix in Court of Appeals.

along with any write-in votes that might be cast for other representatives, at least 50% plus one of the votes of eligible employees to change the certification on Pan American. If the Clerks name had appeared on the ballot, the Teamsters could have received the certification with as little as 25% plus one of the ballots counted, provided more than 50% of the eligible employees voted (R. 187).

During the course of this first election, fraudulent letters bearing the forged names of Mr. George Meany, President of the AFL-CIO, and Mr. C. L. Dennis, President of the Clerks, and written on forged letterheads of the two organizations, were sent to the Pan American employees involved advising the employees that the Clerks name had been omitted from the ballot inadvertently and that a write-in campaign was being conducted on behalf of the Clerks. Officers and representatives of the Clerks immediately filed sworn affidavits with the Mediation Board to the effect that the Clerks were not involved in the forgery (R. 188). The Teamsters have never done this. The filing of a false affidavit would subject the individuals involved to criminal penalties under Federal statutes.[3] On October 6, 1966, on petition of the Clerks, the election was set

[3] It was not until January 2, 1968, that an affidavit was finally filed in the District Court on this subject by the Teamsters in support of a motion for reconsideration of the ruling of the District Court granting the motion of the Clerks et al. for a preliminary injunction (R. 202-206). This affidavit was a thinly disguised effort to beef up the Teamsters position on appeal. It was filed 18 months after the fact by an individual not an officer of the Teamsters and simply denies personal responsibility for the fraud. It is a far cry from the immediate and unequivocal affidavits submitted to the Mediation Board by the Clerks president and principal representatives and serves to underscore the Teamsters reluctance to do likewise.

aside by the Board and a new election ordered to be conducted in November, 1966. However, the Board did not tell the employees that it was acting because of the fraud involved, but issued a bland generalized statement concerning the "atmosphere" surrounding the election (R. 69). Subsequently, the Board circulated to the employees a statement which failed to make clear that the Clerks were not responsible for the fraud and misleading the employees to the effect that the Clerks had committed some fault (R. 8, 41, 188).

The Clerks objected to the immediate rescheduling of a second election on the grounds that coming so soon it would necessarily be influenced by and tainted by the fraud committed in the first election, as well as the Board's failure to candidly inform the employees of the reasons for invalidating the first election and its misleading information to the employees. The Board rejected the objections. The Clerks filed suit in the District Court to enjoin the second election (Civil Action No. 3013-66). In an opinion dated November 30, 1966, United States District Judge Holtzoff expressed the view that the Clerks position had a great deal of merit, but ruled that the Court could not interfere because of the limited nature of judicial review of Board actions (R. 9, 188). The District Court, therefore, dismissed the complaint of the Clerks for lack of jurisdiction of the subject matter (R. 189).

The Clerks appealed the decision and asked the Court of Appeals to stay the second election pending disposition of the appeal (Case No. 20606). The Court of Appeals denied the stay in a majority opinion and a concurring opinion, dated December 16, 1966 (*Brotherhood of Railway & Steamship Clerks* v. *National Mediation Board, et al.*, 374 F. 2d 269). The majority opin-

ion agreed with the District Court's view of the merit of the Clerks position. It criticized the Board for its lack of candor and its inept handling of the matter, including its failure to properly advise the employees involved as well as its misinformation to such employees indicating some fault of the Clerks. It found that "It will not do to say that both candidates have been accused of wrong when the fact is that one has been indicted for murder, and the other has only received a parking ticket." At the same time, the Court expressed the view that it could not then intervene, particularly in the form of the extraordinary remedy of a stay, and in light of the availability of effective relief if the second election, in fact, were stained by fraud. It cited, *inter alia,* the fact that counsel for the Board had asserted that the Board had authority to provide such relief even though the ballots had been counted. The concurring opinion read in pertinent part as follows (374 F. 2d at 275, 276):

> "I agree that our jurisdiction is narrow and limited but I cannot quite agree that the Board's action falls short of calling for our intervention by means of a stay of governmental action. The Board's curative efforts here were extraordinarily feeble when considered alongside the blatant fraud and forgery by persons advocating the cause of the Teamsters Union. The Board's complacency has a clear tendency to encourage the shocking conduct which it purports to chide. If such tactics succeed, the victory of the Teamsters will be the fruit of gross fraud, forgery and chicanery. Except for the adjective 'gross', which I think valid, it seems to me we all agree on the vice of the conduct complained of.
>
> "I refrain from recording a dissent only because of the likelihood that Appellants may take steps to set aside the election, should it be adverse to them."

The second election was also a mail ballot election. The ballot was the same as that used in the first election. The name of the Clerks did not appear on such ballot and neither the Board nor the Teamsters objected. The ballots were counted in New York City, December 27, 1966, through December 30, 1966. The Mediator's report to the Board recorded a total of 3,517 ballots of which the Teamsters received 3,091. The report showed that 6,936 employees of Pan American were eligible to participate. Thus, 48 more ballots were recorded than were necessary to certificate the Teamsters in place of the Clerks to represent the employees involved (R. 10, 11, 190, 191). The fraud the Clerks feared appeared, as well as other facts affecting the integrity of the election.

The Clerks therefore challenged the validity of 1,178 ballots on the grounds that (1) 137 ballots were in the form of write-in votes for the Clerks clearly induced by the fraud which had permeated the election and contained designations urged to be used for such write-ins in the fraudulent documents circulated among the employees; (2) 757 ballots were also products of fraud and other violations of Federal law because they were in unpostmarked envelopes, which could not have gone through the mails because the regulations of the Post Office Department required the postmarking of such envelopes,[4] and these appeared only after all ballots

[4] This was substantiated by an opinion from Mr. Timothy J. May, General Counsel of the Post Office Department, citing Part 332 of the Postal Manual, which required that such envelopes be postmarked if they had gone through the mails and further stating that the percentage of envelopes not postmarked as to the total, i.e. in excess of 20%, is "believed to be extremely in excess of the percentage which may be expected to occur" by inadvertence (R. 46, 47).

had been removed from the custody of the Post Office in New York in violation of the rules of the election; and (3) 284 write-in ballots were cast for the Transport Workers Union after Mr. David Cole, the Impartial Umpire under the provisions of the AFL-CIO Constitution, had ruled that TWU could not legally seek representation of the employees involved under the prohibitions of that Constitution and such decision had been affirmed by the AFL-CIO Executive Council (R. 33, 34, 44-47, 48, 49).

Any one of the three serious and substantial challenges affecting the honesty and integrity of the election was sufficient to require dismissal of the Teamsters application under the Board's established interpretation and application of the Railway Labor Act. *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, at page 669 (footnote 5).[5] The Clerks, therefore, requested dismissal of the Teamsters application. The Teamsters attempted to increase the number of valid votes and thus provide themselves with a cushion by an appeal, asserting that approximately 84 ballots not counted for various reasons should have been counted. The Teamsters appeal did not challenge the omission of the Clerks name from the ballot in the second election (R. 42, 191).

Although the integrity of its proceedings was involved, the Board did nothing for seven months. Finally, on September 12, 1967, the Board released another of its vague findings, which have become a hallmark of its action in NMB Case No. R-3781, sidestepping the issues (R. 18-25) The Board, in the language

[5] The Board's past applications of this rule appear at pages 151-153 of the record.

of the Court of Appeals (41a), "did not rule on any of these contentions". It said that "no useful purpose would be served" by such findings and once again took refuge in a vague reference to "the whole congeries of facts" (R. 22).

The bulk of the Board's findings was devoted to an issue not before the Mediation Board, i.e. the absence of the Clerks name from the ballot. The Board held that its action in not requiring the Clerks name to appear on the ballot in the first two elections was contrary to an alleged long established interpretation and application of the Railway Labor Act to which it was now returning. The Board therefore ruled that it was holding a third representation election on Pan American and that the Clerks name must be on the ballot or the Clerks must relinquish its right to represent the employees involved (R. 23-25). This finding was factually and legally incorrect (the Board's standing policy was just the opposite, i.e. it had always permitted an incumbent union to remain off the ballot when it so desired (R. 54-56)) and was made with respect to an issue not before the Mediation Board and an issue upon which the Clerks had had no opportunity to be heard.

The Clerks promptly filed a petition for reconsideration on September 21, 1967 (R. 149-170). The petition asked the Board to make findings on the issues before it and to dismiss the Teamsters application.

The Clerks separately petitioned the Board to dismiss the Teamsters application on the ground that a valid representation dispute does not now exist because changes in the size and composition of the craft or class of Pan American employees involved make clear the Board could not have before it sufficient employee authorization cards to support the Teamsters applica-

tion (R. 50-53, 167, 168). Section 2, Fourth, of the Railway Labor Act (45 U.S.C.A., Section 152, Fourth), provides that a majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for purposes of the statute. In implementation of this statutory requirement, Section 1206.2 of the Board's rules governing the handling of representation disputes (R. 50 A) requires that a representation application be supported by approved authorization cards from at least a majority of the craft or class involved. At the time the representation application was originally filed by the Teamsters, the craft or class of employees involved embraced 6,936 employees. Thus, under the statute and implementing rules, the Teamsters were required to then have on file with the Board approved authorization cards covering at least 3,469 employees. The size of the craft or class is now substantially greater. Pan American figures released in September 1967 show that it now numbers some 8,000 employees (R. 51, 52). Moreover, by then there had been a substantial turnover of at least 2,448 employees in the craft or class. This means that of the original craft or class of 6,936 employees, only 4,488 employees remained from whom the Board would have to have in excess of 4,000 authorization cards or about 90%, a practical impossibility, for there to be a valid representation election under the Board's regulations (R. 52). By now, there would be even less of the original group employed by Pan American. The Board has heretofore applied its rules so as to dismiss representation applications in such circumstances (R. 52, 53).[6]

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[6] Case No. R-2160, dated March 15, 1950, in which the Board dismissed a representation application on the ground that turnover since filing the application invalidated it (R. 52, 53).

On October 24, 1967, the Board issued a decision reaffirming its original action (R. 13, 26-30, 192). In this decision, the Board still refused to pass upon the issues raised by the Clerks. It made no findings with respect to the validity of the ballots the Clerks contended were induced by fraud, with respect to the validity of the unpostmarked ballots, or with respect to the validity of the write-in ballots for the Transport Workers Union (R. 13, 26-30, 192).

With respect to its efforts to decertify the Clerks if its name did not go on the ballot in a third election, the Board tacitly admitted it was in error in its findings of September 12, 1967, and now attempted to justify its action (R. 28) on the ground that such action was required by the decision in *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965).

Thereafter, the Board assigned a Mediator to conduct an investigation leading up to a third representation election. The Board denied the request of the Clerks that this investigation be scheduled so as not to conflict with the representation investigation in NMB Case No. R-3947 on the property of Braniff International Airways also involving the Clerks and Teamsters in order that the Clerks designated representatives, particularly the Director of its Air Transport Division, could participate in both (R. 193, 194).

The Board also applied its decertification ruling to NMB Case No. R-3947, then pending before it, which involved a Teamsters application to take over the certification of clerical, office, and related employees of Braniff International Airways, which the Clerks had continuously represented since April 5, 1948 (R. 257). As indicated above, the Board also scheduled its re-

sumed investigation in the Braniff case, over the objections of the Clerks, to conflict with the Pan American case (R. 193, 194).

The Clerks, along with interested Pan American and Braniff employees, filed suit in the District Court in two separate cases for declaratory and injunctive relief against the Board. The complaint in Civil Action No. 2853-67, involving Pan American (R. 5-16), alleged that (1) the Board had violated its statutory duty to "investigate" the dispute as well as its own established interpretation and application of the Railway Labor Act and its own regulations by refusing to pass on the ballot challenges which would lead to dismissal of the Teamsters application; (2) the Board had no statutory power to attempt to decertify the Clerks as it sought to do, its regulations did not provide such a requirement, and the requirement was improperly adopted as an *ad hoc* action directed at the Clerks rather than as a general rule; and (3) the Board had acted in a grossly arbitrary and highhanded manner in unnecessarily scheduling the two representation investigations at conflicting times so as to exclude the Clerks chosen representatives from one or the other. The complaint in Civil Action No. 2854-67, involving Braniff (R. 220-227), contained allegations (2) and (3) in the Pan American complaint. In each case, the Clerks et al. prayed for a preliminary injunction to bar holding of the representation elections pending a decision on the complaint (R. 31, 229).

The Board moved to dismiss each complaint or grant it summary judgment (R. 179, 239). The Teamsters, an intervenor in Civil Action No. 2853-67, did likewise with respect to the complaint in that case (R. 180). The District Court denied the motions of the Board and

the Teamsters and granted the Clerks et al. a preliminary injunction in each case (R. 183-197; 253-261). The District Court's Conclusions of Law in Civil Action No. 2853-67 (substantially the same as those in Civil Action No. 2854-67) read as follows (R. 195, 196):

> "1. The complaint raises substantial issues as to whether the Board has acted within its statutory authority under Section 2, Ninth, of the Railway Labor Act, in its actions enumerated above or has exceeded that authority, and as to whether the Board has acted in conformity with its own promulgated rules and regulations. It also raises substantial issues as to whether the Board has complied with the requirements of Section 2, Ninth, and of due process that it conduct a fair and impartial investigation of the representation dispute in NMB Case No. R-3781.
>
> "2. The plaintiffs are entitled to a trial and final determination of these issues on the merits. The Court has jurisdiction to entertain the complaint and render a final determination on the issues raised therein under Title 28 of the United States Code, Sections 1331, 1332, 1337, and 2201, and Section 10 of the Administrative Procedure Act, as amended (5 U.S.C., Section 701).
>
> "3. The plaintiffs have exhausted all administrative remedies available to them. Unless enjoined by this Court, the Board will proceed to conduct a third representation election in NMB Case No. R-3781 in accordance with its decisions of September 12, 1967, and October 24, 1967.
>
> "4. The conduct of a third representation election in NMB Case No. R-3781, prior to a final determination of the merits of the complaint, will result in irreparable injury to plaintiffs. The Court has also given consideration to the arguments of the defendants and of the intervening de-

fendant that the public interest and the interest of other parties require a denial of plaintiffs' motion for a preliminary injunction and concludes that they do not outweigh the irreparable injury which will result to the plaintiffs if a third election is conducted under the facts found above prior to a final determination of the merits of the complaint.

"5. There is sufficient probability that the plaintiffs will prevail upon the merits of one or more of the issues raised by the complaint herein to warrant this Court granting the plaintiffs' motion for a preliminary injunction."

On appeal, the Court of Appeals held that there was no jurisdiction in the District Court to entertain the complaints (p. 36a). The Court expressed "uneasiness" about the Board's intentions with respect to the "name on the ballot" issue, declared that it found "unsettling" and "unfair" to the Clerks the Board's actions, and that the Board's "Alphonse-Gaston interplay" was disquieting. However, the Court found it must put aside its disquietude because there could be judicial review of Mediation Board actions in representation matters only in "instances of constitutional dimension or *gross violation of the statute.*" (Emphasis supplied.) The Court of Appeals therefore concluded that the complaints should be dismissed.[7]

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[7] The Court of Appeals, by order dated July 11, 1968, stayed the issuance of its opinion and judgment to the District Court until August 5, 1968, pending the filing of a petition for a writ of certiorari with this Court to review such judgment and, if such petition be filed, thereafter until final disposition by this Court. On July 17, 1968, Mr. Justice Black denied a Teamsters motion to vacate the stay.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the present case conflicts with the decisions of this Court, as well as numerous decisions of other Federal courts, with respect to jurisdiction of Federal courts to review actions of the Mediation Board. In the present case, the Court of Appeals held that there can be no judicial review of actions of the Mediation Board except in "instances of constitutional dimension or gross violation of the statute", i.e. the Railway Labor Act, and it was against this standard that the complaints here involved were measured (p. 36a). Any plain, ordinary, everyday violation of the statute by this Federal agency cannot be reviewed by the courts. There must be a violation so obvious on its face that it can be characterized as a "gross violation". However, that is not what this Court and other Federal courts have said in the leading cases dealing with the Mediation Board.

In the most recent of these decisions, *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965), this Court reviewed its decision in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, which involved a suit to cancel a certificate issued by the Board in a representation case, and described that decision as one in which the courts refused to consider the merits of a claim as to whether the Board could divide crafts or classes of a single carrier into smaller units for collective bargaining purposes because Congress had committed such decisions to the Board and the dispute was to reach its last terminal point when the administrative finding was made. With these principles in mind, this Court in the *ABNE* case further held that one of the statutory duties of the Board was to "investigate" repre-

sentation disputes and then proceeded to decide on the merits "whether the Board's reaffirmation of the R-1706 determination in these cases was made after a sufficient investigation, within the meaning of the Act": (p. 665). This Court concluded (p. 668) that the Board had performed its statutory duty and the substance of its determination was, therefore, not subject to judicial review.

This line of demarcation has been generally followed by the Federal courts, including the Court of Appeals. *WES Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 314 F. 2d 234 (D.C. Cir., 1962); *UNA Chapter, Flight Engineers' International Association* v. *National Mediation Board, et al.*, 294 F. 2d 905 (D.C. Cir., 1961); *Airline Stewards and Stewardesses Association* v. *National Mediation Board, et al.*, 294 F. 2d 911 (D.C. Cir., 1961), *cert. den.* 369 U.S. 810; *Decker, et al.* v. *Linea Aeropostal Venezolana, et al.*, 258 F. 2d 153 (D.C. Cir., 1958); *Airline Dispatchers Association, et al.* v. *National Mediation Board, et al.*, 189 F. 2d 685 (D.C. Cir., 1951), *cert. den.* 342 U.S. 849; *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 179 F. 2d 446 (D.C. Cir., 1949); *United Transport Service Employees of America, et al.* v. *National Mediation Board, et al.*, 141 F. 2d 724 (D.C. Cir., 1944); *National Federation of Railway Workers, et al.* v. *National Mediation Board, et al.*, 141 F. 2d 725 (D.C. Cir., 1944); *Brotherhood of Railway and Steamship Clerks, Etc.* v. *Atlantic Coast Line R. Co.*, 201 F. 2d 36 (4th Cir., 1953); *Rose, et al.* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (4th Cir., 1950); *Locomotive Engineers* v. *National Mediation Board*, 68 LRRM 2103, decided by the District Court for the

District of Columbia on April 26, 1968, in which appeal is now pending.[8]

The line drawn by these cases is a far cry from saying, as the Court of Appeals does in the present case, that there must be either a constitutional violation or a "gross statutory violation". This Court in *ABNE* was not reviewing, based on *Switchmen's Union,* any claim of "gross violation of the statute." It was reviewing whether the Board had conducted a "sufficient investigation" in making the determination and that inquiry depended essentially upon whether the Board should have granted United Air Lines a hearing on its claim that the craft or class should be split.

The complaints of the Clerks et al. in the District Court in the present situation do not ask the courts to go nearly so far. They raise the essential questions of whether the Board has met its statutory duty to conduct a sufficient investigation within the meaning of the Act; whether the Board has exceeded its statutory powers; and whether the Board has ignored its own rules. These issues are more substantial in terms of Mediation Board compliance with the statute and its rules than the issue of the procedures followed by the Board in making the craft or class determination, the sufficiency of which this Court reviewed in *ABNE.*

Moreover, in refusing to rule on the Clerks challenges to the second election, the Board removed itself from the protective embrace of *Switchmen's Union* since it did not make the administrative finding which this Court stated in that case was to serve as the "last

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[8] Reference is to Labor Relations Reference Manual.

terminal point". It refused to do so without any reason therefor.

2. The decision of the Court of Appeals raises substantial Federal questions which with respect to the application of the Railway Labor Act should be reviewed by this Court.

This decision makes abundantly clear that almost unlimited confusion surrounds the subject of judicial review of Mediation Board actions. The Court found as "unsettling" and "unfair" the Board's reliance on alleged confusion caused by the Clerks failure to appear on the ballot in the Pan American case, since this amounted to disadvantaging the Clerks for the reprehensible acts of other persons (p. 47a). The Court also found "unsettling" the Board's view "that the Supreme Court gives it no choice but to continue its present ballot, with an on-the-ballot policy," because it found that different balloting procedures might have different impacts on the stability of representation and that the Board had considered none of these (pp. 47a, 48a). Finally, the Court expressed as "disturbing" the situation confronting it in the following finding (pp. 48a-49a):

> "The choice of what policy to follow is essentially for the Board to make. It is, however, for that very reason disturbing that on the one hand the courts refuse to involve themselves deeply in the substance of these questions, emphasizing the nearly unlimited powers of the Board, while on the other, the Board is heard to protest that its answers are mandated by the need for application of dictum in judicial opinion. This Alphonse-Gaston interplay is disquieting, with all due allowance for the possibility that the Board has given full consideration to the considerable problems, and uses court precedent as a palliative against pressures rather than as a prime mover of Board action."

However, the Court finally concluded that it "must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union*" which it interpreted as requiring a case of "gross violation of the statute" as a condition precedent to judicial review (p. 50a). Thus, the Court brought into play for the first time a standard not set forth in any of the decisions of this Court on the subject. It stated that the application of any such standard does not involve the application of legal concepts of jurisdiction but an exercise "in practicalities", involving, *inter alia,* "a peek at the merits". Thus, we are no longer dealing with legal concepts but a "rule of law" governed by practicalities influenced by "peeks" without the benefit of any full consideration and findings by the lower court. Such a doctrine is fraught with confusion. It creates a new standard between some sort of indefinite non-gross statutory violation and an equally indefinite "gross violation". This excursion into the unknown of something less than gross violations, which the Board is free to commit no matter how disturbing to a court's sense of statutory meaning and fair play is to be governed not by judicial rules but by practicalities. If this is the law, then the statute should clearly be amended. But first this Court should say it is the law.

This decision also creates a standard for judicial review of Mediation Board actions unknown to the law. The concept that an agency may violate its statutory duty with impunity and outside the pale of judicial restraint so long as it keeps such violations within the boundaries of a non-gross violation raises issues of importance in the administration of the Railway Labor Act and with obvious implications for administrative agencies generally. The ever continuing growth of air

transportation with the ever increasing responsibility of the Board for the stability of that industry require that the Board perform within the statute and not within some gray area of statutory violations not amounting to gross violations thereof. The failures of this agency have already provoked crises in rail and air transportation and required special legislation for compulsory arbitration. If any Federal agency ever needed the hand of judicial restraint upon its actions, the Mediation Board does.

3. The Court of Appeals decision raises a basic question of due process to litigants and the encouragement of administrative irresponsibility.

The Clerks et al. find themselves in the strange position that the Federal courts who have considered the Clerks problems with the Board in the present dispute have, on the one hand, found the Clerks position to be meritorious, and have roundly criticized the Board in the four different opinions or findings issued in this matter, stating, *inter alia,* that the Board was guilty of blandness and complacency even in the face of blatant fraud and forgery; that its actions encouraged such fraud; that the Board's actions were unsettling and unfair and the cause for disquietude and concern, while at the same time the Clerks have been unable to even get the Board to pass upon its challenges because the Board's defiance of the statute and its own regulations is said to fall short of a gross statutory violation. Moreover, this conclusion is reached only by the application of a vague standard of "practicalities" applied through the procedure of a "peek" at the merits.

It is respectfully submitted that this concept embodies a basic unfairness to a litigant in the position of the Clerks et al. as fully attested to by the situation in which they find themselves. If "gross violations" are

to be the measuring rod to be considered in terms of "practicalities", then the Clerks et al. are entitled to a determination made only on the basis of a full record.

In addition, it is submitted that this concept can only encourage administrative irresponsibility by the Board. This Court does not now have before it an agency which in the *ABNE* case this Court commented (page 671) had provided fair and effective procedures nor one which has lived up to the expressed expectations of the Court that it would continue to do so. After being plainly invited by the District Court and the Court of Appeals, in the litigation concerning the fairness of its holding of the second election, to back up and take another look, the Board insisted upon going ahead. When it was then confronted with the consequences of its actions in the form of substantial issues involving fraud and violations of Federal postal regulations, *inter alia,* it refused to face up to these unpleasant problems and acted in a way strongly suggesting that it simply looked for a way out. The Board thus no longer comes before this Court in the garment of fairness and impartiality that it did in the *ABNE* case, but in a tattered garment around the edges of which swirl actions of fraud and other violations of Federal law or regulations committed in its proceedings in derogation of the honesty and integrity of those proceedings, about which it has done nothing effective and with respect to which it even refuses to come to grips by passing on the issues before it. Given the rule of law propounded by the Court of Appeals in the present litgation, it can only be reasonably expected that this process of administrative irresponsiblity will be encouraged and grow worse. The Board does not even have to worry any more about whether it is violating the statute, but only about whether its violation is suf-

ficiently gross to invoke judicial interference. To say the least, it is doubtful that Congress would ever confer such unbridled power on any Federal agency, much less on one with the enormous power wielded by the Board whose stewardship has been brought into question by the facts shown on the records of the litigation of the last two years.

4. The complaints in the District Court raised substantial issues as to the Board's compliance with statutory requirements which should be decided only on the basis of a full trial in the District Court by any standard, including that of gross statutory violations.

A. Issue Relating to the Board's Failure To Perform Its Duties To Properly Investigate by Making Findings on Challenges to the Validity of Ballots

The Clerks objected to the second election in NMB Case No. R-3781 on the grounds that such election would be influenced by the fraud committed in the first election. Both the District Court and the Court of Appeals believed that there was substantial merit to the Clerks objections but resolved a close question of jurisdiction by permitting the second election to proceed with the clear understanding and upon the express representation of the Board counsel that there were corrective meassures available to the Clerks before the Board if its fears proved to be correct. The second election raised a substantial issue as to whether votes to invalidate the election and require dismissal of the Teamsters application had been induced by fraud (R. 41-44). The Clerks, therefore, used the avenue for correction which the Board had represented to the Court of Appeals was available with respect to the impact of the fraud upon the second election. The facts

available and presented to the Board (R. 41-44) clearly raised a substantial issue. If the 137 ballots were induced by fraud, they should have been invalidated by the Board. *Kearney & Trecker Corp.* v. *National Labor Relations Board,* 210 F. 2d 852 (7th Cir., 1952), *cert. den.* 348 U.S. 824.

The Clerks challenges also raised substantial issues with respect to the validity of unpostmarked ballots that did not comply with Federal law. The only evidence that these ballots had been mailed by individuals through the mails in accordance with the Board's regulations, rather than placed among the valid ballots in some other fashion,[9] was the Federal postmark. The Mediator validated these ballots solely on the grounds that since they were franked mail they did not require a postmark. This ruling was contrary to Federal Postal regulations, the correct interpretation and application of which were supported by an opinion of the General Counsel of the Post Office Department. Here, again, a sufficient number of ballots were involved to invalidate the election and require dismissal of the Teamsters application (R. 44-47).

Finally, the Clerks raised a substantial issue as to the validity of write-in ballots for TWU, which could not legally serve (R. 48-49). This was raised both because (1) the Board itself had a ground rule that such ballots were invalid, which was applied in this case to other ballots (R. 49), and (2) Federal courts have held that a union determined to be ineligible to represent employees pursuant to an arbitration cannot *participate* in a representation election. *United Textile*

[9] The ballots were outside of the custody of the Post Office for a substantial period.

Workers of America v. *Textile Workers Union of America,* 258 F. 2d 743 (7th Cir., 1958); *International Brotherhood of Firemen and Oilers* v. *International Association of Machinists,* 338 F. 2d 176 (5th Cir., 1964).

The least that the Clerks had a right to expect under the Board's statutory duty to properly investigate the representation dispute before it was that it would consider and act upon these challenges. As the Court of Appeals has found (p. 41a), it refused to do so.

The Court of Appeals opinion (p. 42a), without the benefit of a full trial on the merits, concludes that the investigatory requirements of the Board authorized it to refuse to pass upon the challenges. It is respectfully submitted that the issues raised are, as the District Court found, substantial, entitling the Clerks et al. to a trial in the District Court on the merits.

B. The Issue of the Board's Statutory Authority To Require the Clerks Name To Go on the Ballot or To Abandon Representation Rights

In the first two elections in Case No. R-3781 involving Pan American the Clerks elected to omit its name from the election ballot. Neither the Mediation Board nor the Teamsters objected to this election and the Clerks name did not appear on the ballot. Neither the Board nor the Teamsters at that time advanced any contention to either the District Court or the Court of Appeals that the Clerks election was not entirely proper and the exercise of a statutory right. However, when the Board issued its decision of September 12, 1967, it ruled that in a third representation election on the property of Pan American the Clerks name must appear on the ballot or the Clerks must abandon any

claim to represent the employees involved. This ruling was based upon the Board's erroneous finding that it had a long established interpretation and application of the statute requiring an incumbent union's name to be on a representation ballot which it had not previously applied in NMB Case No. R-3781 and to which it was now returning (R. 23-25). The Board's action was taken without any claim or issue before it with respect to the omission of the Clerks name from the ballots in the previous two elections.

In its decision of October 24, 1967, the Mediation Board reaffirmed its action and also applied this action to the representation proceedings in NMB Case No. R-3947 on the property of Braniff (R. 26-30). The Board was forced to recede from its reliance upon the erroneous interpretation and application of the statute previously cited by it for the basis of its action and rely upon a claim that the *ABNE* decision *required* it to take the action that it did (R. 28, 29).

The complaints in both cases in the District Court alleged that this action of the Board exceeded its statutory authority, violated its statutory duty to conduct fair and impartial investigations in representation disputes, violated its own rules, and was contrary to the requirements of due process. The District Court held that it had jurisdiction to entertain these complaints and render a decision on the merits (R. 195, 259).

The Court of Appeals found that the Board action was not *required* by the decision in the *ABNE* case, but that the Board was *authorized* to take the action. At the same time, the Court expressed substantial concern about the Board's handling of the problem pp. 45a-49a).

It is respectfully submitted that the *ABNE* case does not authorize the Board to attempt a decertification of an incumbent union as is attempted in this case. This proposed ruling of the Board is not a matter of the form or control of the ballot. It is a substantive ruling and must be based upon the Board's statutory authority. Unlike the National Labor Relations Act, which gives the NLRB authority to decertify, the Railway Labor Act confers no such authority on the Mediation Board. However, it makes no difference whether the Board was authorized or was not authorized to take the action. After it was demonstrated to the Board that it erred with respect to its finding of past policy, the Board stated that the reasons for its action were that under the *ABNE* case "the Board has little discretion to adopt any other course" (R. 29). The Court of Appeals, on the other hand, found that the Board had discretion to fashion a different ballot. Consequently, at the very least this important issue should be remanded to the Board for a decision based upon the exercise of such discretion and not upon the erroneous assumption by the Board that it is, in substance, required to so act by the *ABNE* decision.

C. The Issue of the Board's Refusal To Apply Its Regulations to Determine the Present Existence of a Representation Dispute

It is uncontroverted that changes in the composition of the craft or class of employees involved on Pan American since 1965 have been such that the Board does not now have before it and cannot have before it the number of authorization cards on behalf of the Teamsters to give rise under its own regulations to a valid representation dispute (R. 50-53). It however refused to apply those regulations to the present chal-

lenge on the grounds that there were sufficient cards three years ago, in spite of the fact that this has been its past practice and procedure (R. 52, 53). The District Court found that this issue was one with respect to which the Clerks et al. were entitled to a trial on the merits. The Court of Appeals, following its concept of "gross violation", found insufficient basis for judicial review. It is respectfully submitted that the District Court was correct.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX